PATRICK NAVARAJAH MARTIN & ANOR

v.

GUNAPATI SUPPIAH & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ZAINUN ALI J
[ORIGINATING SUMMONS NO: 24-1549-1999]
3 NOVEMBER 1999

CIVIL PROCEDURE: *Originating summons - Filed after affidavit in support was affirmed - Non-compliance with Form 7 - Rules of the High Court 1980, O. 7 r. 2 - Failure to state relevant statute or rule of RHC in intitulement - Whether originating summons ought to be dismissed*

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether a nullity - Whether supported a non-existent cause or matter*

CIVIL PROCEDURE: *Locus standi - Action to remedy wrong done to company - Whether plaintiffs had locus standi to bring action - Whether action was brought on behalf of company - Whether company should be cited as plaintiff to action*

In this case, the court dealt with the following preliminary objections: (i) that the affirmation of the affidavit in support on 16 August 1999 before the filing of the originating summons ('OS') on 23 August 1999 rendered the OS defective; (ii) that the memorandum to be subscribed on the OS did not comply with Form 7 (the absence of the address and the occupation of the plaintiffs); (iii) that the OS did not state the relevant statute or any particular rule of the RHC in its intitulement; and (iv) that the plaintiffs were not the proper parties to be cited as plaintiffs in this suit.

Held:

[1] The affidavit in support is a nullity as it supports a non-existent cause or matter. The OS was unsupported and must be dismissed. Even O. 41 r. 4 Rules of the High Court 1980 could not be used to cure this nullity.

[2] The failure of the said memorandum to comply with Form 7 prejudiced the rights of the defendants particularly on the aspect of whether the plaintiffs were within jurisdiction to allow the defendants the right to apply for security for cost or counterclaim.

[3] Based on the fundamental principle that a party must not take either his opponents or the court by surprise, an originating process which fails to state with sufficient particularity, either in its heading or body, the statute or rule of court under which the court is being moved, is liable to be struck out unless amended.

[4] The OS did not clearly disclose a cause of action but merely contained the prayers it wished for. An OS must contain a concise statement of relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief is claimed. On this ground alone, the OS should be dismissed.

[5] There was a clear oversight on the plaintiffs' part when there appeared to be 4 plaintiffs in the OS when in actual fact there were only two.

[6] The plaintiffs had no *locus standi* to bring an action to remedy a wrong done to a company. Going by the rule in *Foss v. Harbottle*, the proper plaintiff in this suit was Syarikat Equitable Loss Adjusters Sdn Bhd.

[Preliminary objections allowed; OS dismissed.]

Case(s) referred to:
Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 ***(refd)***
AMF Bhd v. Serajuddin [1999] 6 CLJ 405 ***(refd)***
OB Bhd v. Sathunarty [1998] 4 CLJ 417 ***(refd)***
Platinum Heights Sdn Bhd v. Sum Mix Concrete [1997] 1 MLJ 409 ***(refd)***
Selvarani v. Sundara [1999] 6 CLJ 477 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 41 r. 4

For the plaintiffs - G Ravi (Norman Fernandez with him); M/s Gurbakhash Tan & Ezura
For the 1st, 3rd, 4th & 5th defendants - RR Mahendran (Gunapathi with him); M/s RR Mahendran & Co
For the 2nd defendant; MK Bani; M/s Darshan Chong & Co

Reported by Usha Thiagarajah

JUDGMENT

Zainun Ali J:

Decision

The 1st, 3rd, 4th and 5th defendants in this suit raised 4 preliminary objections to the Originating Summons ('OS') at encl. (3). Taking on the 1st preliminary

objection, it was submitted that the OS is defective as it is not supported by evidence.

The OS was filed 23 August 1999 whereas the affidavit in support encl. (4) was affirmed on 16 August 1999. After having heard submissions and after having read the authorities cited, it is apparent that the affidavit is a nullity as it supports a non-existent cause or matter. Apart from the cases where counsel undertakes that such affidavits be resworn, affidavits to be used in court proceedings can only be sworn and filed in proceedings that are actually pending. Thus the OS stands unsupported and must be dismissed. Furthermore, even the provision in O. 41 r. 4 RHC cannot be used to cure this nullity. The following cases were cited by the defendants to support their argument:

(1) *AMF Bhd v. Serajuddin* [1999] 6 CLJ 405; [1999] 1 AMR 118.

(2) *OB Bhd v. Sathunarty* [1998] 4 CLJ Supp 417.

(3) *Selvarani v. Sundara* [1999] 6 CLJ 477.

With regard to the 2nd preliminary objection, the memorandum to be subscribed on the OS has not complied with Form 7 (the absence of the address and occupation of the plaintiffs) and which I believe prejudices the rights of the defendants particularly on the aspect of whether the plaintiffs are within jurisdiction to allow the defendants the right to apply for security for cost or any counterclaim.

The 3rd preliminary objection relates to the failure of the OS to state the relevant statute or any particular rule of the RHC in its intitulement upon which the plaintiffs are relying in respect of the relief they are seeking against the defendant. Based on the fundamental principle that a party must not take either his opponents or the court by suprise, an originating process which fails to state with sufficient particularity, either in its heading or body, the statute or rule of court under which the court is being moved is liable to be struck out unless it is amended.

On the strength of the authority of *Platinum Heights Sdn Bhd v. Sun Mix Concrete* [1997] 1 MLJ 409, there appears to be no substantive issue for the court's determination as the OS filed by the plaintiffs does not clearly disclose a cause of action but merely contained the prayers it wished for.

It must be noted that an OS is just like a pleading in a statement of claim. It must contain a concise statement of relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief is claimed. On this ground alone encl. (3) ought to have been dismissed.

Furthermore, in the 5th relief in encl. (3), there appears to be 4 plaintiffs when in actual fact there are only two, a clear oversight on the plaintiffs' part.

In any event, the proper plaintiff in this suit, going by the rule in *Foss v. Harbottle* is *Syarikat Equitable Loss Adjusters Sdn Bhd.* It is clear the plaintiffs have no *locus standi* to bring an action to remedy a wrong done to a company. Assuming the plaintiffs intended a derivative action, under the exception to the rule in *Foss v. Harbottle*, not only the wrongdoers must be cited as defendants, so too must the company. The title to the action must reflect that the suit is being brought in a representative capacity and there must be an express statement in the pleading that the action is being brought for the benefit of the company, failing which this action is liable to be struck out as being frivolous and vexatious. (*Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417).

For the reasons given, the preliminary objections raised are allowed and the originating summons is dismissed with costs.